Mohd Yusof bin Awang & Anor v Malayan Banking Bhd & Anor

HIGH COURT (KUANTAN) — ORIGINATING SUMMONS NO 24–128–1992
ARIFIN ZAKARIA J
2 MAY 1995

Civil Procedure *— Costs — Costs order against advocate and solicitor personally — Jurisdiction of court to make order — Procedure to be followed where such order was sought — Summary jurisdiction of court to require counsel to show cause why order should not be made — Whether notice to show cause was given*

Civil Procedure *— Costs — Costs order against advocate and solicitor personally — Plaintiff a bankrupt — Action struck off — Authority of advocate and solicitor to act for client — Whether solicitor's lack of knowledge of bankruptcy a defence*

Legal Profession *— Costs — Personal liability for costs of action — Plaintiff a bankrupt when action commenced — Action struck off — Whether advocate and solicitor should be personally liable for costs of action — Authority to act — Whether solicitor's lack of knowledge of bankruptcy a defence*

The first plaintiff was a bankrupt when the proceedings against the defendants were instituted. The action was ordered to be struck out. The second defendant applied for an order that the advocate and solicitor for the first plaintiff be personally liable for costs of the action on the ground that the first plaintiff was an undischarged bankrupt at the time of the commencement of this action and no sanction had been obtained from the Official Assignee's office as required by s 38(1) of the Bankruptcy Act 1967. As such, the second defendant's counsel argued, the advocate and solicitor has no authority to act on behalf of the first plaintiff and therefore the advocate and solicitor should be ordered to pay the second defendant's costs personally. The senior assistant registrar refused the application. The second defendant appealed.

On appeal, the advocate and solicitor for the first plaintiff raised two procedural objections — the second defendant did not pray for such an order in his application; and no notice to show cause was ever given to him. Further, he stated that he was not aware of the fact that the first plaintiff was a bankrupt when he took out the originating summons, and for that reason he said he should not be penalized.

Held, allowing the appeal:

(1) No prayer for the relief of cost could be made against the advocate and solicitor for the first plaintiff as he was not party to the action.

(2) However, the party concerned might apply for a cost order against the advocate and solicitor personally at the close of the proceedings and the court might then ask the advocate and solicitor to show cause why such an order should not be made against him, provided the advocate and solicitor should have due notice of what the claim was against him and sufficient opportunity to meet the claim in any way that was reasonably necessary.

(3) That jurisdiction of the court was exercisable summarily upon application by originating summons, or motion or summons, or at the hearing of the proceedings.

(4) Here, the record of proceedings before the SAR showed that the second defendant had applied for a cost order against the advocate and solicitor for the first plaintiff personally and the trial judge had heard arguments of both parties on the application. Further, the advocate and solicitor had been asked why costs should not be ordered against him in the present appeal. Therefore, the advocate and solicitor had sufficient notice of the application and had sufficient opportunity to put up his case why such order should not be made against him.

(5) The advocate and solicitor who had taken on himself to act on behalf of the first plaintiff had impliedly warranted that he had the authority to act on behalf of the first plaintiff. A solicitor who entered an appearance warranted that he had authority from his client to enter the appearance.

(6) As it turned out that the first plaintiff was a bankrupt when the action was commenced against the second defendant, the advocate and solicitor for the first plaintiff had breached his warranty of authority and he should be personally liable for all the costs thrown away.

[Bahasa Malaysia summary

Plaintif pertama adalah seorang bankrap apabila prosiding terhadap defendan dimulakan. Tindakan itu diperintahkan supaya dibatalkan. Defendan kedua memohon untuk satu perintah supaya peguamcara dan peguambela untuk plaintif pertama dijadikan bertanggungan secara sendiri untuk kos tindakan itu atas alasan bahawa plaintif pertama adalah seorang bankrap yang belum dilepaskan apabila tindakan dimulakan dan tiada kebenaran diperolehi dari Pegawai Pemegang Harta seperti yang dikehendaki oleh s 38(1) Akta Kebankrapan 1967. Oleh itu, hujah peguambela defendan kedua, peguambela dan peguamcara itu tidak mempunyai kuasa untuk bertindak bagi pihak plaintif pertama dan lantaran itu peguambela dan peguamcara itu patut diperintahkan membayar kos defendan kedua sendiri. Penolong kanan pendaftar menolak permohonan itu. Defendan kedua merayu.

A Atas rayuan, peguambela dan peguamcara untuk plaintif pertama menimbulkan dua bantahan prosedur — defendan kedua tidak memohon perintah sedemikian di dalam permohonan beliau; dan tiada notis untuk memberi sebab pernah diberikan kepadanya. Lagipun, beliau menyatakan bahawa beliau tidak mengetahui hakikat bahawa plaintif pertama adalah seorang bankrap apabila B beliau mengambil keluar saman pemula, dan untuk sebab itu beliau berkata bahawa beliau tidak patut dipersalahkan.

Diputuskan, membenarkan rayuan itu:

C (1) Tiada permohonan untuk relief bagi kos boleh dibuat terhadap peguambela dan peguamcara untuk plaintif pertama kerana beliau bukanlah satu pihak kepada tindakan itu.

(2) Namun demikian, pihak yang terlibat boleh memohon untuk satu perintah kos terhadap peguambela dan peguamcara itu sendiri di akhir prosiding dan mahkamah boleh pada masa itu D meminta peguambela dan peguamcara itu memberi sebab kenapa perintah sedemikian tidak patut dibuat terhadapnya, asalkan peguambela dan peguamcara itu mesti diberikan notis tentang apakah tuntutan terhadapnya dan peluang yang mencukupi untuk menjawab tuntutan itu dalam apa cara yang munasabah.

E (3) Bidang kuasa mahkamah boleh digunakan secara terus sebaik sahaja permohonan dibuat melalui saman pemula, atau usul atau saman, atau di pembicaraan prosiding itu.

(4) Di sini, rekod prosiding di depan penolong kanan pendaftar menunjukkan bahawa defendan kedua telah memohon untuk F satu perintah kos terhadap peguambela dan peguamcara untuk plaintif pertama sendiri dan hakim perbicaraan telah mendengar hujah kedua-dua pihak atas permohonan itu. Lagipun, peguambela dan peguamcara itu telah ditanya kenapa kos tidak patut diperintahkan terhadapnya di dalam rayuan ini. G Oleh itu, peguambela dan peguamcara itu mempunyai notis yang mencukupi tentang permohonan ini dan mempunyai peluang yang mencukupi untuk mengemukakan kesnya mengapa perintah sedemikian tidak patut dibuat terhadapnya.

(5) Peguambela dan peguamcara yang telah bersetuju untuk bertindak bagi pihak plaintif pertama telah memberi waranti H secara tersirat bahawa beliau mempunyai kuasa untuk bertindak bagi pihak plaintif pertama. Seorang peguamcara yang telah memasukkan kehadiran memberi waranti bahawa beliau mempunyai kuasa dari kliennya untuk memasukkan kehadiran.

(6) Oleh kerana plaintif pertama adalah seorang bankrap apabila I tindakan itu dimulakan terhadap defendan kedua, peguambela dan peguamcara untuk plaintif pertama telah mengingkari waranti kuasanya dan beliau patut dijadikan bertanggungan secara sendiri untuk semua kos yang telah dibuang.]

Notes

For cases on costs in civil procedure, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 838–1088; [1994] *Mallal's Digest* 249–260; [1995] *Mallal's Digest* 153–166.

For cases on liability for costs of action, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1485–1486; [1995] *Mallal's Digest* 1230.

Cases referred to

Brenden v Spiro [1938] 1 KB 176 (folld)
Mitra & Co v Thevar & Anor [1960] MLJ 79 (folld)
Dunn, Re; Simmons v Liberal Opinion Ltd [1911] 1 KB 966 (folld)
Yonge v Toynbee [1910] 1 KB 215 (folld)

Legislation referred to

Rules of the High Court 1980 O 65 r 11

Dato S Sivasubramaniam (*Siva Ram & Associates*) for the first plaintiff.
Bastian Pius Vendargon (*Vendargon & Partners*) for the second defendant.

Arifin Zakaria J: This is an appeal from the SAR's decision refusing the second defendant's application for an order that the advocate and solicitor for the plaintiff be personally liable for costs of this action which was ordered to be struck off. Having heard arguments of both counsel I allowed the appeal and ordered the advocate and solicitor for the plaintiff to pay the second defendant's costs both before the SAR and the costs of this appeal. The advocate and solicitor is dissatisfied with my decision and hence this appeal.

Both before the SAR and before me, counsel for the second defendant urged the court to make the order for costs against the advocate and solicitor for the first plaintiff personally on the ground that the first plaintiff was an undischarged bankrupt at the time of the commencement of this action and no sanction had been obtained from the Official Assignee's office as required by s 38(1) of the Bankruptcy Act 1967. As such, the second defendant's counsel argued, the advocate and solicitor has no authority to act on behalf of the first plaintiff and therefore the advocate and solicitor should be ordered to pay the second defendant's costs personally. Before I deal with the merits of this application, let me dispose of two procedural objections raised by the advocate and solicitor of the first plaintiff. He argues that this application is procedurally wrong for two reasons, namely:

(a) the second defendant does not pray for such an order in his application; and

(b) no notice to show cause was ever given to him. On the first objection, my answer is that, no such prayer could in the first place be made since the advocate and solicitor concerned is not a

party to this action. In my view, the party concerned may in appropriate cases, apply for such an order at the close of the proceedings and the court may then ask the advocate and solicitor to show cause why such an order should not be made against him. In the case of *Mitra & Co v Thevar & Anor* [1960] MLJ 79, Hepworth J without any application being made called upon the appellant there and then to show cause under O 65 r 11 why the costs incurred by the plaintiff there should not be disallowed as between solicitor and client and also why he should not repay to his client the costs awarded to the defendant in the action. On appeal, even though the order of Hepworth J against the advocate and solicitor was reversed, Thomson CJ noted with approval the procedure adopted by Hepworth J. Further support may be found in what was said by Scott LJ in Brendon v Spiro [1938] 1 KB 176 at p 192:

> But in my view there is no rule of procedure which affects the judge's jurisdiction. The summary jurisdiction which he possessed over the solicitors as officers of the court is, for the reasons I have already given, clear. I think it was for him to exercise his own discretion as to the appropriate procedure, taking care that the solicitor, who were in the position of respondents to the application, should have due notice of what the claim was against them, and sufficient opportunity to meet the claim in any way that was reasonably necessary.

This jurisdiction of the court is exercisable summarily upon application by originating summons, or motion or summons, or at the hearing of the proceedings. (See 44 *Halsbury Laws of England* (4th Ed) para 252.)

From the above authorities it may be gleaned that the court's jurisdiction over the matter is summary in nature and may even be made at the hearing of the proceedings itself, as it was done in the present case. The court, however, in exercising such jurisdiction should ensure that the advocate and solicitor against whom the application was made had due notice of the claim and he had sufficient opportunity to meet the claim as is reasonably necessary.

The record of proceedings before the SAR shows that counsel for the second defendant did apply for the order for costs to be made against the advocate and solicitor acting for the first plaintiff personally on the ground that at the time the originating summons was taken out against the two defendants, the first plaintiff was a bankrupt. After hearing arguments of both parties, the learned SAR ordered that the costs be paid by both the defendants. Therefore, it cannot be gainsaid that the advocate and solicitor concerned had no notice of the application and had not been given sufficient opportunity to meet the claim made against him. Further, no such objection was raised before the SAR by the advocate and solicitor; it is only before me this objection was raised. In fact, when the learned advocate and solicitor took up the objection before me, I expressed the view that he may even be asked to show cause even at this stage of the proceedings — after all the appeal before me was by way of rehearing. I then asked him why costs should not be

ordered against him as prayed by counsel for the second defendant. He then proceeded to argue against the application on the merits. It is my view that the learned advocate and solicitor had sufficient notice of the application and has had sufficient opportunity, both before the SAR and before me, to put up his case why such order should not be made against him. On those premises I find no merit in his objections on the procedural ground.

Next, let me deal with the merits of the second defendant's application. It is not in dispute now that when this originating summons was taken out against the defendants, the first plaintiff was a bankrupt. However, when the issue of the first plaintiff's bankruptcy was raised by the second defendant in his affidavit of 19 August 1992, Dato' S Sivasubramaniam, the advocate and solicitor of Messrs Siva Ram & Associates, on behalf of the first plaintiff denied the same and stated that he had made an official search with the Official Assignee's office in Kuala Lumpur and it was confirmed that the first plaintiff was not a bankrupt. The second defendant in his affidavit of 12 February 1993 stated that from the search made by his solicitor at the Official Assignee's office in Pahang, it was found that the first plaintiff was a bankrupt. He further stated that in the bankruptcy petition concerned, Messrs Siva Ram & Associates represented the judgment creditor.

In his submission before me, Dato' Siva Subramaniam stated that he was not aware of the fact that the first plaintiff was a bankrupt when he took out this originating summons. For that reason he said he should not be penalised. Mr Vendargon submitted that based on the authorities, knowledge or the lack of it regarding the bankruptcy of a party to a suit is not a relevant consideration for this purpose. First, let me consider the case of *Yonge v Toynbee* [1909] 1 KB 215. In that case solicitors were instructed by a client to conduct his defence to an action which was then threatened and was afterwards commenced against him. Before the commencement of the action, the client became, and was certified as being, of unsound mind. In ignorance of his unsoundness of mind and of his having been so certified, the solicitors entered an appearance for him in the action, and delivered a defence, to which the plaintiff replied, and other interlocutory proceedings took place in the action. Subsequently, the action not then having come to trial, the plaintiff's solicitor was informed that the defendant had been certified as being of unsound mind; and an application was made on behalf of the plaintiff at chambers for an order that the appearance and all subsequent proceedings in the action be struck out, and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of action up to date, on the ground that they had so acted without authority. The master made an order that the appearance and subsequent proceedings in the action the struck out, but refused to make an order for payment of the plaintiff's costs by solicitors personally, which refusal was on appeal affirmed by the judge. The Court of Appeal allowed the plaintiff's appeal on the ground that the solicitors who had taken on themselves to act for the defendant in the action had

thereby impliedly warranted that he had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action.

Yonge v Toynbee (supra) was followed in *Re Dunn, Simmons v Liberal Opinion Ltd* [1911] 1 KB 966. There the plaintiff issued a writ against Liberal Opinion Ltd for an alleged libel contained in a newspaper purporting to be published by the defendant company. Appearance was entered for and defence filed by AE Dunn as solicitor for the defendant. As it turned out the defendant company had not been registered and therefore was not in existence at the time the solicitor was purported to be acting for the company. There the solicitor for the defendant company was ordered to pay the costs incurred by the plaintiff that had been thrown away by reason of the appearance entered by the solicitor. Fletcher Moulton LJ at p 972 said:

> It has always been held that a solicitor who enters an appearance warrants that he has authority from his client to enter the appearance. ...
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> This is a principle which was not only been recognised, but it is a principle which is almost a necessity to the procedure in our courts. A plaintiff cannot challenge the acts of the defendant's solicitor in the action. He is bound to treat them as acts authorized by the defendant himself, and if it were not held that the solicitor warrants that he has authority from his client to do all the things necessary for the action the gravest injustice might often be done.

Applying the same principle to the present case, likewise the advocate and solicitor purporting to act on behalf of the first plaintiff is deemed to have warranted that he had the authority to act on behalf of the first plaintiff. As it turns out that the first plaintiff was a bankrupt when the action was commenced against the second defendant, therefore, I hold that the advocate and solicitor should personally be liable for all the costs thrown away; and I now order that the advocate and solicitor pay the costs of the originating summons which was ordered to be paid by the first plaintiff to the second defendant. The appeal is therefore allowed with costs.

Appeal allowed.

Reported by Gary Kwan